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No. 80-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

T. BERTRAM LANCE,
Appellant,

versus

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the
United States Court of Appeals
For the Fifth Circuit

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

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SUPPLEMENTAL APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

FEDERAL ELECTION COMMISSION

versus Civil Action File
Number C77-172R

T. BERTRAM LANCE

Filed: Feb. 10, 1978

ORDER

This case is before the court on the petition of the Federal Election Commission for enforcement of a subpoena issued pursuant to 2 U.S.C. §437d(a)(3). Jurisdiction is invoked under 2 U.S.C. §437d(b).

T. Bertram Lance was a candidate for Governor of Georgia in 1974. Pursuant to a complaint filed by an individual, and on the basis of information ascertained in the ordinary course of carrying out its supervisory responsibilities over the Federal Election Campaign Act of 1971, as amended, the Federal Election Commission ("the Commission") found reason to believe that violations of 2 U.S.C. §441b had been committed by the 1974 Bert Lance for Governor Campaign Committee, the Calhoun First National Bank, Calhoun, Georgia,

and the National City Bank of Rome, Georgia. On November 10, 1977, the Commission issued a subpoena requiring Mr. Lance's appearance for a deposition on December 2, 1977. The Commission denied a motion to quash the subpoena and directed Mr. Lance to appear for the deposition as subpoenaed. The deposition was rescheduled for December 9, 1977, but Mr. Lance failed to appear.

In response to the Commission-sought subpoena enforcement, Mr. Lance has assembled an impressive array of argumentation to demonstrate the Commission's inability to prosecute a civil action in this case. Mr. Lance ignores a fact the court cannot: The statutory authority for the Commission's investigation is broad and inclusive, providing for subpoenas when the Commission has determined a violation of the Act may have occurred. Congress has not limited subpoena enforcement to the prosecution of non-demurrable civil cases and it is not within the purview of this court to do so.

The Federal Election Campaign Act of 1971, as amended, provides:

> (a) The Commission has the power —
>
> (3) to require by subpoena, signed by the chairman or vice chairman, the attendance and testimony of witnesses and the production of all documentary

> evidence relating to the execution of its duties; . . . .
>
> 2 U.S.C. §437d

The duties of the Commission include an obligation to investigate alleged violations when "[t]he Commission . . . has reason to believe that such a violation has occurred." 2 U.S.C. §437g(a)(2). Once the Commission determines it has reason to believe a violation has occurred, the mandatory nature of its duties is reflected in language indicating the Commission "shall make an investigation". The Commission found reason to believe 2 U.S.C. §441b had been violated, an investigation was begun, and Mr. Lance's subpoena was issued.

The court must decline Mr. Lance's invitation to quash the subpoena because a civil case may not be possible and a criminal case may be statutorily barred. The Commission's authority is broad enough to investigate possible violations of the Federal Election Campaigns Act by national banks in a state election. *U.S. v. Clifford*, 409 F.Supp. 1070, 1073 (E.D. N.Y. 1976). The validity of any potential civil action is not an issue for the court's consideration in a subpoena enforcement action under the Federal Elections Campaign Act. The Commission has determined the Act may have been violated and they are entitled to enforcement of a properly issued subpoena without regard to the prospects for a valid civil action.

Accordingly, the Respondent is directed to make himself available for a deposition to be scheduled at a time convenient for all parties.

SO ORDERED, this the 9th day of February, 1978.

/s/ HAROLD L. MURPHY
UNITED STATES DISTRICT
JUDGE

SUPPLEMENTAL APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

FEDERAL ELECTION COMMISSION

v. Civil Action File
Number C77-172R
T. BERTRAM LANCE

Filed: March 27, 1978

ORDER

On February 9, 1978, the court entered an order compelling the defendant to make himself available for a deposition to be taken by the Federal Election Com-

mission. Pending before the court is Mr. Lance's motion for reconsideration.

1. The first ground for reconsideration concerns an advisory opinion issued by the Federal Election Commission on February 8, 1978. The opinion concluded that contributions made for the sole purpose of retiring campaign debts resulting from elections held before January 1, 1975 are not subject to limits effective May 11, 1976. Unlike the case under consideration in the Advisory Opinion, Mr. Lance is subject to an investigation for possible violations of a provision of the Federal Election Campaign Act which has been in effect since 1907. Contrary to Mr. Lance's interpretation, the Advisory Opinion is not denying the Commission's jurisdiction as to all elections occurring prior to January 1, 1975.

2. The second ground for reconsideration is the court's failure to embrace Mr. Lance's arguments as to the limited jurisdiction of the Federal Election Commission. The court's earlier order clearly recognized that the subpoena had been issued in the statutorily prescribed manner and under the Commission's clear authority to investigate alleged violations of federal election laws.

To review briefly, "Congress has not limited subpoena enforcement to the prosecution of non-demurrable civil cases." This approach is consistent with the case authority:

> The better approach is simply to recognize that in the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a *possible* future case. . . . The district court is not free to speculate about the poss.ble charges that might be included in a future complaint. . . . The court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, and that a complaint may not, and need not, ever issue. *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977) (en banc) (Emphasis in original).

The court's authority to decline enforcement is thus narrowly prescribed. See also, *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 201 (1946).

3. Accordingly, the motion for reconsideration is DENIED.

This the 24th day of March, 1978.

/s/ HAROLD L. MURPHY
UNITED STATES DISTRICT
JUDGE

SUPPLEMENTAL APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1859

FEDERAL ELECTION COMMISSION,
Plaintiff-Appellee,

versus

D.C. Docket
No. C77-172K

T. BERTRAM LANCE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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Before COLEMAN, Chief Judge, BROWN, AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

A panel of this Court having submitted this case to the en banc Court for resolution of the first amendment issue,

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court enforcing the subpoena be, and the same is hereby affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

January 27, 1981

COLEMAN, Chief Judge, with whom GARZA, TATE and THOMAS A. CLARK, Circuit Judges, join dissenting:

Issued as Mandate:

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* Judge Jerre S. Williams did not participate in the oral argument or the conference on this case and, therefore, does not participate in this decision.

CERTIFICATE OF SERVICE

I, Emmet J. Bondurant, do hereby certify that I have this day served the within and foregoing Supplemental Appendix to Jurisdictional Statement by mailing copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

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This ____ day of April, 1981.

Emmet J. Bondurant